

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

---

**ARMANDO G MATA**  
Claimant

**APPEAL 19R-UI-00855-AW-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABSOLUTE OUTDOOR SERVICES INC**  
Employer

**OC: 12/10/17  
Claimant: Appellant (2)**

---

Iowa Code § 96.5(2) – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32 – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Armando Mata, Claimant, filed an appeal from the April 6, 2018 (reference 04) unemployment insurance decision that denied benefits because he was discharged from work with Absolute Outdoor Services Inc. due to violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on February 14, 2019 at 1:00 p.m. Claimant participated and was represented by attorney Lorraine Gaynor. Brianna Mata was a witness for the claimant. Employer participated through Chad Williams, Owner. Spanish interpretation was provided by Maria (ID number 11898) from CTS Language Link. Employer's Exhibits 1 – 2 were admitted. Official notice was taken of the administrative record.

Claimant moved to preclude any testimony and evidence regarding offers of employment made by employer to claimant between December 2017 and January 2018 based upon previous decisions regarding refusal of work and availability. The testimony and evidence presented herein is relevant to many issues affecting eligibility for unemployment insurance benefits. Other decisions based on the evidence presented herein do not preclude consideration of that same evidence in determining the issue of separation. Claimant's motion is denied.

**ISSUE:**

Whether claimant's separation was a discharge due to disqualifying job-related misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a laborer from August 2015 until his employment with Absolute Outdoor Services, Inc. ended on December 24, 2017. (Williams Testimony) Claimant's job entailed seasonal mowing work and off-season snow removal work. (Williams Testimony) Claimant's direct supervisor was Chad Williams. (Williams Testimony)

During the last week of November 2017, employer held a meeting with employees to discuss the seasonal layoff and the procedures and expectations of employees performing off-season snow removal work. (Williams Testimony) Employer's policy is that employees on a seasonal

layoff with off-season work who expect to return to seasonal work the following spring must be available for snow removal or shop work during the off-season period if employer needs them. (Williams Testimony) If employees will not be available for off-season work, employer requires them to complete and submit a time-off request form. (Williams Testimony) Claimant knew the policy and followed it in prior off-seasons. (Exhibit 1, p. 7) Employer's policy does not state what will happen if the off-season policy is violated; employer has no job abandonment policy in its employee handbook. (Williams Testimony) Claimant received no prior warnings for failure to complete a time-off request form. (Williams Testimony)

The first week of December 2017, employer placed claimant on a seasonal layoff. (Williams Testimony) Claimant left for Mexico on December 16, 2017 due to a family emergency. (Claimant Testimony) Claimant did not complete a time-off request form or provide employer with notice of his absence. (Claimant Testimony) Employer contacted claimant on December 19, 2017 to perform snow removal. (Williams Testimony) Claimant did not respond. (Williams Testimony) Another employee informed employer that claimant was in Mexico. (Williams Testimony) Employer contacted claimant's daughter who confirmed that claimant went to Mexico. (Williams Testimony) Employer contacted claimant again on December 24, 2017 for snow removal and received no response from claimant. (Williams Testimony) Because employer had received no response from claimant personally, employer assumed claimant had abandoned his job and stopped service to claimant's company phone. (Williams Testimony) Employer told claimant's daughter to tell claimant to return the telephone to employer when he returned from Mexico. (Williams Testimony) Claimant returned from Mexico between January 13, 2018 and January 16, 2018. (Claimant Testimony) Claimant returned the company telephone to employer on January 17, 2018. (Claimant Testimony)

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason. Benefits are allowed provided claimant is otherwise eligible.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left his employment. *Irving v. Emp't Appeal Bd.*, 883 N.W.2d 179 (Iowa 2016). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where there is no expressed intention or act to sever the employment relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). In this case, the employer has not met its burden of proving the claimant voluntarily left his employment. Claimant did not have an intention to terminate his employment relationship; claimant was merely temporarily absent from work due to a family emergency. Because claimant expressed no intention or act to sever his employment relationship, claimant's separation from employment must be analyzed as a discharge.

Iowa Code section 96.5(2)(a) provides:

An individual shall be *disqualified for benefits*:

2. *Discharge* for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)(a) provides:

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition of misconduct has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Reigelsberger v. Emp't Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993); *accord Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000). Further, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

Iowa Admin. Code r. 871-24.32(7) provides:

(7) *Excessive unexcused absenteeism.* Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Iowa Admin. Code r. 871-24.32(8) provides:

(8) *Past acts of misconduct.* While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Excessive absences are not considered misconduct unless unexcused. The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second,

the absences must be unexcused. *Cosper*, 321 N.W.2d at 10. The requirement of “unexcused” can be satisfied in two ways. An absence can be unexcused either because it was not for “reasonable grounds,” *Higgins*, 350 N.W.2d at 191, or because it was not “properly reported,” holding excused absences are those “with appropriate notice.” *Cosper*, 321 N.W.2d at 10.

Claimant’s absences on December 19, 2017 and December 24, 2017 are unexcused, because claimant did not properly report his absence to employer; however, claimant’s unexcused absences are not excessive. Employer has not met its burden of proving disqualifying, job-related misconduct. Claimant was discharged for no disqualifying reason. Benefits are allowed.

**DECISION:**

The April 6, 2018 (reference 04) unemployment insurance decision is reversed. Benefits are allowed provided claimant is otherwise eligible.

---

Adrienne C. Williamson  
Administrative Law Judge  
Unemployment Insurance Appeals Bureau  
Iowa Workforce Development  
1000 East Grand Avenue  
Des Moines, IA 50319-0209  
Fax: 515-478-3528

---

Decision Dated and Mailed

acw/rvs